IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25-8-2006

CORAM

THE HONOURABLE MR.JUSTICE P.K.MISRA
AND
THE HONOURABLE MR.JUSTICE M.JAICHANDREN

O.S.A.No.290 of 2001

1.M/s.Abhirami Foundation
Rep. by its Partner
R.Premanayagam
2.Premanayagam
3.Avudainayagi .. Appellants

vs

1.K.C.Nalini Bai
2.K.C.Udaya Kumar Babu
3.K.C.Rabindran Kumar Babu
4.K.C.Krishna Kumari
5.K.C.Lalitha Kumari
6.K.C.Kamini Kumari
7.K.C.Guna Kumari
8.K.C.Sasi Kumari
9.K.C.Sarala Kumari
10.K.C.Radhika Raj Kumari
11.K.Dhanapal .. Respondents

Appeal under clause 15 of Letter patent and order XXXVI Rule of O.S.Rules preferred against the judgment and decree delivered by the Single Judge in C.S.No.648 of 1997 dated 28.3.2001.

For Appellants : Mr.M.Sriram

For Respondents : Mr.R.Manickavel
for RR1 to 10
R11-Dismissed order
dated 18.2.2005

JUDGMENT

(Judgment of this Court was delivered by P.K.MISRA, J.)

Heard the learned counsels appearing for the parties.

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2. The defendants 1 to 3 have filed this appeal against the judgment of the learned Single Judge in C.S.No.648 of 1997 dated 28.3.2001. Such suit was filed by the plaintiffs 1 to 10 / respondents for recovery of money and directing the defendants jointly and severally to pay Rs.79,69,500/- together with interest at the rate of 24% per annum on Rs.57,75,000/-.

3. The allegations made in the plaint are briefly stated hereunder :-

One Chittibabu Naidu was the owner of the property comprised in Door No.77, Arcot Road, Kodambakkam, Chennai, having an extent of 5 grounds and 454 sq.ft. Plaintiff No.1 is the wife of Chittibabu and Plaintiffs 2 and 3 are their sons and Plaintiffs 4 to 10 are their daughters. On the death of Chittibabu on 11.11.1983, the plaintiffs succeeded to the property. First defendant is a partnership firm of which the defendants 2 to 4 are the partners. First defendant was engaged in real estate business and also as promoters and developers of house plots. Second defendant, who is an Auditor and Financial Consultant, was introduced to the plaintiffs by their Auditor. In May, 1995, the plaintiffs and the defendants have entered into a joint venture agreement in respect of 50% of the suit property. As per such agreement, the first defendant firm agreed to promote and develop the land by constructing a multi-storied commercial and residential complex. To facilitate such construction, the plaintiffs executed a power of attorney in favour of the second defendant on 19.5.1995 empowering such defendant to deal with 50% of the suit property. However, such joint venture agreement could not fructify and the plaintiffs agreed to sell the entire property in favour of the first defendant firm for a consideration of Rs.1,40,00,002/- and executed an agreement of sale dated 20.12.1995. The plaintiffs have agreed to execute a power of attorney in favour of the second defendant to seek and enter into agreement with prospective buyers, to sell the property, receive sale consideration and to do all other acts. At that stage, the first defendant paid a sum of Rs.7 lakhs as advance and the first defendant agreed to pay the entire sale consideration in three instalments by March, 1996. The defendants agreed to pay Rs.10 lakhs by January, 1996 and another Rs.10 lakhs by 29.2.1996 and the entire balance by 31.3.1996. In pursuance of such agreement of sale, the plaintiffs executed two power of attorneys in favour of the second defendant to deal with the suit property. The first defendant had so far paid Rs.82,25,000/-. Last payment of Rs.5 lakhs was made on 23.11.1996 and a balance sum of Rs.57,75,000/- was yet to be paid. The second defendant at the time of the agreement had undertaken not to execute sale deed till the entire amount had been paid to the plaintiffs. Since the second defendant was not paying the amount, the plaintiffs on enquiry found that the

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second defendant had already sold substantial portion of the suit property and received consideration, but had not handed over the money. On the persistent demands made by the plaintiffs, five cheques signed by the third defendant on behalf of the first defendant worth about Rs.47,75,000/- were handed over advising the plaintiffs to encash one cheque in a week and giving the impression that all the five cheques can be encashed by the end of two months period. While the matter stood thus, the plaintiffs received a telegram dated 25.9.1997 from the second defendant asking the plaintiffs not to present the cheques for encashment and a letter to that effect was sent on 26.9.1997. The plaintiffs having become suspicious, made enquiries in the Office of the Sub Registrar and found that the second defendant had already executed 14 sale deeds in favour of Goundamani, Selvi and Santhi between 25.3.1996 and 10.3.1997 and realised a sum of Rs.1,41,22,000/- from them as against the payment of Rs.82,25,000/- paid to the plaintiffs. Thereafter the plaintiffs published a notice in Dina Thanthi canceling the power of attorneys and also executed cancellation deeds revoking the power granted in favour of the second defendant on 24.9.1997 and 25.9.1997. The plaintiffs had also issued notice dated 23.9.1997 calling upon the defendants to pay the balance consideration. The second defendant sent reply dated 7.10.1997. However, he had not given the details of the sale deeds executed on behalf of the purchasers. The second defendant issued a further reply dated 7.10.1997 stating that by the impugned publication, the plaintiffs have caused damages to the reputation of the first defendant firm and therefore the plaintiffs should pay a sum of Rs.55 lakhs. It is the case of the plaintiffs that the defendants have acted in breach of the agreement and in view of the delay in payment, they were also liable to pay 24% interest on the balance consideration, besides the second defendant as power of attorney is liable to render accounts. Accordingly the suit was filed.

4. The first defendant in his written statement indicated that such registered partnership of which the defendants 2 to 4 were previously partners had been reconstituted in 1997 and the new partners are one Murugan and Ponnuswamy and such reconstitution had been informed to the plaintiffs. The second defendant and the plaintiffs' Auditor were known to each other by 1989. In May, 1993, the plaintiffs had entered into a joint venture agreement with M/s.J.K. Estates, which was in respect of 3 grounds out of the disputed property. Since there was some dispute relating to that agreement, the second defendant was nominated as arbitrator and subsequently such agreement was cancelled with mutual consent. Thereafter the plaintiffs approached the first defendant in May, 1995 for the purpose of developing a portion of the suit property and a development agreement was entered between the parties. It was agreed to put up a multi-storied residential

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and commercial complex, the cost of which is to be shared between the plaintiffs and the first defendant in equal proportion and in pursuance of such development agreement, the plaintiffs executed a power of attorney in favour of the first defendant, giving authority to the first defendant to deal with 50% of the land in respect of which an agreement was entered into. Even while the agreement was in subsistence, the plaintiffs decided to sell away the entire extent of the suit property and accordingly there was a meeting between the plaintiffs and the first defendant firm, represented by the second defendant, and one Goundamani. Thereafter, on 20.12.1995, the plaintiffs and the first defendant entered into an agreement for sale in respect of the entire property and the plaintiffs have agreed to sell for the consideration of Rs.1,40,00,002/- and on the date of the agreement Rs.7 lakhs was paid as advance and the first defendant was to pay Rs.10 lakhs by January, 1996, further Rs.10 lakhs by 29.2.1996 and the balance by 31.3.1996. Before payment of the second instalment, it was agreed that the plaintiffs must get clearance from the Income Tax authorities and Urban Land & Ceiling authorities, but the plaintiffs did not get any such clearance and they were not able to give vacant possession, causing thereby delay. The second defendant was able to bring about the entire sale of the property between 25.3.1996 and 10.3.1997 and the first defendant has been able to realise a sum of Rs.1,24,54,000/-. The first sale was effected in March 1996, but by then the second defendant had paid Rs.62 lakhs to the plaintiffs. Further payments were made between 19.5.1995 and 31.12.1996 and the defendants have so far paid Rs.1,44,75,000/-, which was in excess of the agreed sale consideration. All such payments by cash, cheques, pay orders or drafts have been made by the third defendant without waiting for actual execution of the sale deed. The plaintiffs insisted the first defendant to issue cheques for balance consideration as security and therefore, five cheques drawn by the first defendant firm and signed by the third defendant were handed over to the plaintiffs. At that stage, it was agreed that when accounts are settled and the entire amount is paid to the plaintiffs, they must return the signed cheques which have been given as security. Even though the plaintiffs have received more than the actual consideration amount, they have been demanding more payment. They were also instigating the tenants to file suit against the first defendant and others. Thereafter, without giving notice, the plaintiffs have chosen to cancel the power of attorney given in favour of the second defendant by executing cancellation deeds dated 24.9.1997 and 25.9.1997. The plaintiffs had also caused publication in newspapers and upon such publication, the defendants informed the plaintiffs not to present the cheques. As a matter of fact, the defendants have received more than the amount due. The defendants claimed in the written statement that they have made several payments on the date mentioned against them, which are extracted hereunder :-

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1.	19.05.1995	By cheque	Rs. 3,50,000
2.	19.05.1995	By cash	Rs. 1,50,000
3.	05.12.1995	By cash	Rs.30,00,000
4.	20.12.1995	By cash	Rs. 1,00,000
5.	20.12.1995	By cash	Rs. 1,00,000
6.	23.01.1995	By cash	Rs.25,00,000
7.	30.03.1996	By cash	Rs.15,00,000
8.	07.05.1996	By cheques	Rs.10,00,000
9.	13,.05.1996	By cheque	Rs. 5,00,000
10.	20.05.1996	By cash	Rs.10,00,000
11.	05.06.1996	By cash	Rs.10,00,000
12.	05.07.1996 to 31.12.1996	By cheques & pro-order	Rs.32,75,000
			Rs.1,44,75,000

After receipt of the notice from the plaintiffs, a suitable reply was given by the defendants and justifying the claim of Rs.55 lakhs as damages. The defendants 2 and 3 filed a Memo adopting the written statement filed by the first defendant.

5. On the above pleadings, the following issues were framed :-

(1) Whether the defendants have paid the entire sale consideration as per the agreement dated 20.12.1995 ?

(2) Whether the payments alleged in para 7 and 8 in the written statement of the defendant 1 is true and correct ?

(3) Whether the defendants are liable to pay any interest and if so, to what amount ?

(4) Whether the plaintiffs are entitled to the suit amount ?

(5) To what relief ?

6. Under Issue Nos.1 & 2, which are practically the main issues to be decided, the learned single Judge held that the defendants had not paid the entire sale consideration as per the agreement Ex.P-2 dated 20.12.1995 and the defendants were liable to Rs.57,75,000/-. It was further held that the plea of the defendants that they had paid Rs.75 lakhs in cash on the dates mentioned in the written statement had not been proved. Under issue Nos.3 and 4, the learned single Judge held that the plaintiffs are entitled to realise Rs.57,75,000/- with 24% interest with effect from 23.9.1997, the date of which they had issued notice under Ex.P-15. Ultimately, the suit was decreed for the aforesaid sum of Rs.57,75,000/- with 24% interest with effect from 23.9.1997 till the date of decree and thereafter at the rate of 9% till realisation with proportionate costs.

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7. Learned counsel appearing for the appellant has challenged the findings of the trial court by contending that the trial court has not considered the effect of evidence adduced on the side of the defendants relating to various payments. It has been contended that though Plaintiff No.3 had admitted to have been signed many of the receipts indicating payments, the trial court has not given proper weight to such documents. Moreover, the trial court has based its conclusions on surmises and conjectures. It has been contended that the trial court should have sent the disputed receipts to the handwriting expert for opinion.

8. Learned counsel appearing for the respondents has submitted that conclusion of the trial court are based on appreciation of relevant materials on record and does not call for any interference.

9. One of the main defence taken by the present defendants/appellants is relating to the payment of Rs.70 lakhs on different dates. The defendants sought to prove such payments by producing receipts purportedly signed by the plaintiff No.3. So far as these receipts which have been marked as Exs.D3, D4 and D6, are concerned, the plaintiff No.3 denies the signature in Exs.D4 and D6. So far Ex.D3 is concerned, the plaintiff No.3 admits the signature. According to the third plaintiff, his signature was obtained in a blank paper, which has been subsequently converted as receipt. When the plaintiffs have denied the signature in Exs.D4 and D6, the defendants filed an application for sending such disputed documents for opinion of handwriting expert. The grievance of the appellants is that no specific order has been passed on that application. A specific ground has been raised in the memorandum of appeal. The counsel for the plaintiffs/respondents further submitted that such application appears to have been ordered on the very same date on which such application was filed that is to say on 15.2.2001, and such application was numbered as O.A.829 of 2001 on 16.2.2001.

10. The Counsel for the plaintiffs/respondents submitted that even though the Court had permitted photographs of the disputed documents to be taken for the purpose of handwriting expert, no further steps have been taken. The Counsel for appellants submitted on this behalf that as a matter of fact, no such order copy has been drafted by the Office, and it was not within the knowledge of the appellants, and therefore, the appellants were at a loss to know as to what has happened. It is unfortunate that no formal order was passed indicating as to whether the application for sending the documents for expert's opinion is allowed or not. We find of course there is an endorsement on the backside of the application. However, on the basis of such endorsement, no

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formal order seems to have been drafted by the Office. Therefore, the contention of the appellants that they were not aware about such order permitting the handwriting expert to examine the documents, appears to be justified.

11. The question as to whether the receipts had been signed by the plaintiff is quite relevant in deciding the appeal. We also feel that interest of justice could be served by setting aside the order of the learned Single Judge and by directing the two disputed documents in question to be examined by the handwriting expert. For the aforesaid purpose, necessary steps should be taken by the defendants/appellants by appointing an Advocate Commissioner in whose presence the handwriting expert could be permitted to take the necessary photographs.

12. In order to avoid the further delay, Ms.R.Poornima, Advocate, No.13, Law Chambers, Chennai, who is present in Court, is appointed as Commissioner, in whose presence the handwriting expert will be permitted to take photographs. The Director, Government Forensic Department, is directed to nominate an experienced handwriting expert belonging to such Department. The appellants are directed to deposit a sum of Rs.5,000/- (Rupees five thousand only) towards tentative cost for the handwriting expert, and the appellants undertake to pay the balance amount. Such amount shall be deposited within a period of four weeks from the date of receipt of the copy of this judgment.

13. So far as the Commissioner is concerned, the appellants shall pay a consolidated sum of Rs.10,000/- (Rupees ten thousand only) to the Commissioner towards fees and expenses within a period of four weeks from the date of receipt of the copy of this judgment. After the handwriting expert furnishes the opinion, he can be cross-examined by any of the parties by filing proper application before the learned Single Judge, and it would be open to the parties to adduce further evidence. The matter shall be disposed of by the learned Single Judge on the basis of the existing evidence and further evidence to be adduced including the evidence of the expert.

14. It is made clear that any observation made by us should not be construed as final opinion in the matter, and the matter should be decided afresh without being influenced in any manner by any observations made in this order or by the learned Single Judge in the judgment impugned. The matter should be finalized by the learned Single Judge as expeditiously as possible preferably within a period of six months after the receipt of the opinion of the handwriting expert.

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15. In the result, this appeal is disposed of accordingly. In view of the provisions contained in Section 67 of the Tamil Nadu Court Fees and Suit Valuation Act, 1955, we further direct that the full amount of the court fee paid on the Memorandum of Appeal in O.S.A.No.290 of 2001 shall be refunded to the appellant.

dpk/nsv

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To:

1)The Director,
Government Forensic Department,
Kamarajar Salai,
Madras 600 001.

2)Ms.R.Poornima,
Advocate Commissioner,
No.13, Law Chambers,
High Court, Madras-104.(+ Warrant)

3)The Sub Assistant Registrar,
Original Side, High Court,
Madras - 104 (with records)

4)The Sub Asst Registrar, Judicial Dept.,
High Court, Madras.

5)The Section Officer,
Accounts Section, High Court, Madras.

6)The Record Keeper,
V.R. Section, High Court,
Madras 104.

+ 1 cc to Mr. M. Sriram, Advocate SR No. 38576

GM(CO)
SR/9.11.2006

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